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July 22, 2013

VIA EMAIL EngelmayerNYSDChambers@nysd.uscourts.gov
The Honorable Paul A Engelmayer, U.S.D.J.
Southern District of New York
40 Foley Square
New York, NY 10007

Re: Lee v. Grand Sichuan Eastern (NY) Inc. et al
Case No. 12-8652(PAE)

Dear Judge Engelmayer:

We are counsel to Plaintiff. We write to oppose Defendants' request to file a motion for summary judgment for the reasons stated below. As a preliminary matter, pursuant to Your Honor's Individual Practices Section 3(H), Defendants' July 17, 2013 letter does not comply as it fails to set forth the legal standard for summary judgment and fails to describe the substantive basis for their summary judgment motion. For this alone, Defendants' pre-motion conference must be denied.

Legal Standard

Under the prevailing standards for summary judgment, Defendants' anticipated motion is frivolous and would not succeed. Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving part is entitled to summary judgment as a matter of law." The burden is on the moving party to demonstrate that there is no genuine dispute regarding any material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995).

Grand Sichuan Eastern (NY) Inc.

Defendants contend that Grand Sichuan Eastern (NY) Inc. must be dismissed from this action as the Plaintiff only worked at Defendants' restaurant location owned by America Hoist, Inc.[1]. Defendants further contend that the corporate defendants do not share any shareholders, officers, directors or managers.

[1] Defendants have sought leave to file a motion for summary judgment, however, it is unclear whether they intend to file a motion to dismiss as against Defendant Grand Sichuan Eastern (NY) Inc. or a motion for summary judgment.

First, as stated in the Complaint and in Plaintiff's unopposed motion for conditional collective certification (which was granted on February 15, 2013), Defendants operate two restaurants in New York City, both under the name "Grand Sichuan Eastern" as a common enterprise: (1) Grand Sichuan Eastern located at 172 8th Avenue, New York, NY 10011; and (2) Grand Sichuan Eastern located at 1049 2nd Avenue, New York, NY 10022. The restaurants are jointly marketed on Defendants' website located at www.grandsichuanny.com. Factors indicating that the Grand Sichuan Restaurants operate as a common enterprise include shared employees, common ownership, common trade name, common logo and common marketing scheme. The individual Defendant, Antong Wang, is listed in the Department of State and New York Liquor Authority as the Chairman or Chief Executive Officer of Grand Sichuan Eastern (NY) Inc. and the principal of Defendant America Hoist, Inc. Further, as Plaintiff stated in his affidavit in support of conditional collective certification, he "personally observed that Defendants interchangeably shifted employees among their restaurants. In addition, when food items were short at one restaurant, Defendants freely re-allocated food items among the Grand Sichuan Eastern restaurants."

Secondly, the issue of whether a defendant is an employer under the Fair Labor Standards Act ("FLSA") is a factual issue. Defendants' blanket denial of employer status of Grand Sichuan Eastern (NY) Inc. is not enough to award summary judgment. During his deposition on May 6, 2013, Defendant Antong Wang made the following admissions regarding his role in the restaurant located at 172 8th Avenue, New York, NY 10011:

The restaurant is owned by his sister-in-law and his wife. (14:15-22)	"Q: Where is the restaurant you say they own and operate? A: On Eighth Avenue Q: Do you know the exact address? A: 172 Eighth Avenue"
He provided support to the restaurant (15:5-14)	"Q: Have you ever assisted the business in any way? A: Yes, sometimes I pick [up] my wife and sometimes I give her technical support. She doesn't have technical skills. Q: What kind of technical support? A: To talk to them about how to cook the dishes, things like that"
He applied for business licenses and entered into guaranties on behalf of Grand Sichuan Eastern (NY) Inc. (18:9-21)	"Q: Did you ever apply for business licenses on behalf of the Eighth Avenue restaurant? A: Yes. Q: What kind of licenses? A: Yes, I was the guarantor for the liquor license because they did not have the credit. Q: What else? A: Yes, when they were ready to sign the rental lease and the landlord requested that I be the guarantor for the lease."
He provided assistance in hiring (19:17-22)	"A: ...When they were hiring they asked for my opinion saying how is this person. So I kind of screen people for them. Q: So you would recommend a hiring for them? A: That's correct"
The restaurants share food	"Q: With respect to food vendors for the Eighth Avenue

vendors (26:15-23)	restaurant are they the same as the ones you used for Second Avenue…so is your answer yes? A: That's right."
The restaurants serve the same food (26:24-27:3)	"Q: Does the Eighth Avenue restaurant serve the same food as the Second Avenue restaurant? A: More or less the same…"
He provided wage and hour compliance advice (40:17-41:6)	"Q: So you're saying you gave recommendations as to how to comply with wage and hour compensation? A: That's right…"

It should be noted that Defendants failed to take any depositions. Discovery is now closed. Thus, it would be virtually impossible for Defendants to prevail on summary judgment due to the aforementioned issues of fact.

America Hoist, Inc.

The issues of whether Plaintiff was paid the proper minimum wage and overtime are the factual issues at the heart of this case[2]. Defendants' allegation that "the evidence shows that Plaintiff has failed to state a claim under FLSA and NYLL based on certain of Defendants' payment records" is insufficient to prevail on summary judgment. It is Plaintiff's position that the schedules produced by Defendant showing hours are false, and that employees were told to sign the false schedule or else they would not be paid. Plaintiff, in his capacity as the assistant manager of Defendants' restaurant located at 172 8th Avenue, New York, New York 10011, was given the false schedules by Antong Wang and instructed to sign to get the other employees to sign.

Both in the Complaint and in his affidavit in support of conditional collective certification, Plaintiff alleges that he worked 7 days per week for 12-14 hours per day, from July 2011 to January 2012, and 5 days per week for 12-14 hours per day from April 2012 to May 2012. He received his compensation on a salary basis by a fixed monthly salary of $1,500 per month, (paid by $800 in cash and $700 in check). Plaintiff never received any wage statements. Viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, Defendants motion for summary judgment must fail.

Based on the foregoing, Defendants request for a pre-motion conference and for leave to file a motion for summary judgment must be denied.

Respectfully,

/s/ C.K. Lee, Esq.

cc: All parties via Email

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[2] Defendants' letter is silent as to Plaintiff's claims for unpaid spread of hours premium, wage statement and wage notice.